Supreme Court, U.S.
FILED

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No. ——

In the Supreme Court of the United States

STOKES COOK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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79 OP-F/D

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the Sixth Circuit committed reversible error in affirming the District Court Judgment which was based upon inadmissible hearsay testimony consisting of overheard statements of alleged co-conspirators, said statements not being made in the furtherance of an alleged conspiracy to possess cocaine hydrochloride with intent to distribute, said hearsay being admitted without a conspiracy having first been established and including the introduction of prejudicial unsworn excerpts from tape-recorded conversations with Defendant Stokes Cook's daughter.

2. Whether the United States Court of Appeals for the Sixth Circuit committed reversible error in affirming the District Court's Judgment due to plain error having been committed by the failure to give a buyer/seller instruction to the jury.

3. Whether the United States Court of Appeals for the Sixth Circuit committed reversible error in affirming the sentencing imposed by the District Court Judgment which failed to correctly apply underlying sentencing policies and principles, including the attribution of an erroneous amount of cocaine to Defendant Stokes Cook, especially in light of the jury verdict and the requirement of proof beyond a reasonable doubt, and also an erroneous finding that defendant was an organizer or leader of a criminal activity involving five or more participants, and insufficient proof of a felony conviction alleged to have been entered in the Criminal Court of Carter County, Tennessee.

PARTIES TO THE PROCEEDINGS

Petitioner:

Stokes Cook, an individual, who is not known to have any affiliation with any publicly traded corporation.

Respondent:

United States of America.

Other Parties:

Dawn Cook and Terry Bridgeman were co-defendants.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Stokes Cook respectfully petitions for a writ of certiorari, to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered July 2, 2001.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was not recommended for full text publication. A copy of the Opinion is attached hereto as "Appendix A". (App. at la) The Judgment in a Criminal Case from which Defendant Stokes Cook appealed is attached as Appendix B. (App. at 23a)

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is a federal criminal prosecution arising out of acts allegedly occurring in. the Eastern. District of Tennessee and prosecuted under 18 U.S.C. Section 2 and 21 U.S.C. Sections 841(a)(1), (b)(1)(C) and 846. The District Court below exercised jurisdiction pursuant to 18 U.S.C. Section 323 and Rule 18, Federal Rules of Criminal Procedure.

Initially, this was an appeal as of right, taken pursuant to Rules 3 and 4, Federal Rules of Appellate Procedure, from the District Court to the Circuit Court of Appeals with jurisdiction over the district. Jurisdiction was proper under 28 U.S.C. Section 1291 and under 18 U.S.C. Section 3742 with regard to the sentencing issues, Judgment was entered September 7, 1999, and a timely Notice of Appeal was filed September 17, 1999.

A three judge panel of United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court on July 2, 2001. (App, at la) This Petition for Writ of Certiorari is filed within, ninety days of that date. Defendant Stokes Cook herewith submits this Petition for Writ of Certiorari pursuant to 28 U.S.C. Section. 1254(a) and Rule 13 of the United States Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are 21 U.S.C. Sections 841(a)(1), (b)(1)(C) and 846, and also the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. In addition, United States Sentencing Guidelines Sections 1B1.3(a)(1)(B), 2D 1.1 (c)(6), 3Bl.l(a) and 5, Part A, Sentencing Table pertain to this case. Copies of the constitutional and statutory provisions are attached hereto as "Appendix C (App. at 31a).

STATEMENT OF THE CASE

References made herein to the Appendices attached hereto shall be designated by the abbreviation, "App.", and the appropriate page number(s). References made to the Joint Appendix for the Sixth Circuit proceedings shall be designated by the abbreviation, "JA", and the appropriate page number(s).

In August 1997, the Tennessee Bureau of Investigation began an investigation of the cocaine distribution activities of Acie Mullins. (App. at 3a) Evidence presented at trial revealed that from June 1996 until July 22, 1998, Mullins traveled to New York and Florida to purchase cocaine and returned to the Eastern District of Tennessee to distribute it. (App, at 3a)

On August 5, 1998, an Indictment was filed in the Federal District Court for the Eastern District of Tennessee, at Greeneville, Tennessee, naming Defendant Stokes Cook, hereinafter referred to as "Stokes", and certain individuals including Stokes' wife, Carol, and daughter, Dawn, David Cross, Alejandro Romero and Terry Bridgeman. (App. at 4a; JA pp. 33-40) Acie Mullins was named as an unindicted co-conspirator. (JA p. 1)

The indictment set forth thirteen counts alleging, among other things, conspiracy to distribute and possess with intent to distribute cocaine hydrochloride, a Schedule II narcotic controlled substance, in violation of 21 U.S.C. Sections 841(a)(1) and 846. (App. at 4a; JA pp. 33-40) Nine of the thirteen counts pertained to Stokes. (JA pp. 39-40)

Stokes entered a plea of not guilty on September 14, 1998. (JA pp. 69)

On February 22, 1999, Dawn Cook entered a plea of guilty to Count One of the indictment, conspiracy to distribute cocaine. (App. at 4a; JA pp. 79-86, 87-8)

The government filed Information to Establish Prior Conviction on March 3, 1999. (JA pp. 89-90)

On March 4, 5 and 9, 1999, jury trial for Stokes and Co-Defendant Terry Bridgeman was held before the Honorable Thomas G. Hull, Federal District Court Judge for the Eastern District of Tennessee, at Greeneville, Tennessee. (App. at 4a; JA pp. 91-3)

Jim Williams, Special Agent with the Tennessee Bureau of Investigation testified Charles Mosier, a confidential informant, had told him Acie Mullins would pay Mosier in cocaine for building a room. (JA pp. 163) Counsel for Stokes objected to the hearsay aspect of what someone told Williams to which the government responded by citing Rule 801(d)(2) regarding what a person in a conspiracy tells another co-conspirator during the course of the furtherance of the conspiracy as an exception to the hearsay rule. (JA pp. 163) Stokes' counsel pointed out no conspiracy had been established, (JA pp. 163) The District Court overruled the objection of Stokes' counsel, indicating it was being assumed there was a conspiracy and if it reached the point no conspiracy was established, then there would be no trial. (JA pp. 162)

Williams testified he later met Mullins and subsequently consummated four separate purchases of cocaine from him. (JA pp. 163-170, 171-177)

Acie Mullins, who was being held in the Greene County Detention Center in Greeneville, testified on behalf of

the government, explaining that he was charged with conspiracy to distribute cocaine, had pled guilty to that charge and was awaiting sentencing. (JA pp. 266) As part of his plea agreement with the government, Mullins agreed to testify if required to do so. (JA pp. 267)

Mullins stated he became involved in cocaine trafficking in the spring of 1997 by traveling to Florida and New York to purchase it and coming back to his partners to distribute it. (JA pp. 267-68) Agent Williams gave Mullins $2,400 to go to Florida and pick up cocaine. (JA pp. 269) Williams later gave Mullins money to go to New York and buy cocaine. (JA pp. 271)

Mullins first met Stokes at Kelly's Bar in Johnson City at the urging of Mosier. (JA pp. 272) Stokes refused to give Mullins money to buy cocaine in Florida. (JA pp. 273-74) Mullins stated Stokes bought five ounces from him when Mullins got back from Florida. (JA pp. 274-75)

Mosier first bought cocaine from Defendant Dawn Cook at Ann's Restaurant around the first of January, an ounce for $1,500. (JA pp. 331-33) About a week later, Mosier and Kenneth Rhodes, Special Agent for the Tennessee Bureau of Investigation, went to Dawn Cook's trailer and bought another ounce from her for $1,500. (JA pp. 333-36)

Counsel for Stokes entered a continuing objection to Dawn Cook's statements made to Mosier being related into testimony, indicating such statements of Dawn Cook repeated by Mosier would not be adm.issible since they were statements not made in furtherance of the conspiracy. (JA pp. 333-40)

Mosier testified Dawn Cook told him she had gone over to her mother's and her mother was going to charge $1,800 but after her mother talked to her father by cell phone, the price was set at $1,500. (JA pp. 341)

On February 14, 1998, Mosier and Agent Rhodes went to Dawn Cook's house again and Agent Rhodes made the buy. (JA pp. 343-45) Toward the end of February, Mosier and Rhodes went back to Dawn Cook's residence, but were unable to make a buy, Dawn Cook telling them her dad had gone to get it but had car trouble. (JA pp. 346)

Later in the month of March, Mosier went over to Stokes trailer at the urging of Dawn Cook to show him her parents were not afraid of him. (JA pp, 347-48) While Mosier was there, Mosier testified Stokes sold him an ounce for $1,550. (JA pp. 349)

Agent Rhodes testified Dawn Cook mentioned during their January 14, 1998 meeting at her trailer with Mosier that her "Daddy" took an eight ball out of the cocaine they bought from her previously. (JA pp. 364, 368) Dawn Cook also talked about Acie Mullins, Stokes and the narcotic business at that meeting. (JA pp. 369)

Rhodes added greater detail to events surrounding Dawn Cook's telling them about her Daddy's car trouble preventing the purchase, (JA pp. 374-76) Rhodes testified he purchased cocaine from Dawn Cook for $1,700 on February 24, 1.998. (JA pp. 378-79) On March 19, 1998, Rhodes stated he and Mosier went to Dawn Cooks' residence and purchased cocaine from her after she told them they were waiting on "Daddy". (JA pp. 379-80) On cross examination, Rhodes agreed it is not uncommon for a seller of narcotics to negotiate the price by pretending the drugs belong to someone

else and use other people's names without consent. (JA pp. 398-99)

Excerpts from tape-recorded conversations between Mosier, Rhodes and Dawn Cook during which Dawn Cook made reference to her "Daddy" were introduced into evidence. (JA, excerpted audio tapes) Defense counsel had previously objected to Dawn Cook's references to "Daddy" being characterized as Stokes. (JA 362)

The jury was charged and on March 10, 1999, returned a verdict finding Stokes guilty on Counts One, Six, Eight and Twelve of the Indictment. (App, at 4a; JA pp. 93) The District Court did not give a buyer/seller instruction to the jury. (App. A at 1. 1.a) Co-Defendant Terry Bridgeman was also convicted. (App. at 4a) Co-Defendants David Cross and Alejandro Romero were not convicted. (App. at 19a)

On July 26, 1999, sentencing hearing for Stokes was held before Federal District Court Judge Thomas G. Hull. (JA pp. 138-41) By Order entered August 23, 1999, the Pre-Sentencing investigation Report was adopted by the District Court except for the quantity of cocaine for which Stokes was to be held accountable, the total offense level was set at 36, criminal history category established at VI, custody range set at 324-405 months, supervised release range determined to be at least 10 years for Count One and at least 6 years for Counts Six, Eight and Twelve, and fine range was held to be between $12,500 to $6,000,000. (JA pp. 145-53) Objections to the Pre-Sentence Investigation Report were filed by Stokes, disagreeing with the computation of his time and the level stated as being wrong, excessive and improperly calculated. (JA pp. 566)

Dawn Cook was sentenced to 87 months with four years supervised release for her conviction on Count One of the indictment. (JA pp. 154) Carol Cook was sentenced to 78 months, set to run concurrently, with five year supervised release, for her convictions on Counts One, Eight and Twelve. (JA pp. 155)

At sentencing hearing before Judge Hull on August 30, 1999, Stokes was sentenced to 324 months total imprisonment, sentencing for all four convictions set to run concurrent, 10 years supervised release on each Count to run concurrent and a special assessment of $400.00. (JA pp. 156) Judgment was entered as to Stokes on September 7, 1999. (App. at 23a)

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the District Court on all issues. (App. at 2a-3a)

With regard to sentencing, the Court of Appeals found that the District Court had apparently credited the hearsay statement of Darnel Brummitt as related by Agent Mike Steadman regarding amounts of cocaine Stokes received with the intent to distribute from June 1996 until July 22, 1998. (App. A at 16a) The testimony of Agent Steadman was taken during the sentencing hearing of July 26, 1999, several months after the jury verdict was rendered on March 10, 1999, and involved the hearsay statement of an alleged co-conspirator, Brummitt, who was not referenced whatsoever at trial. A reading of the Steadman testimony clearly reveals that it actually pertained to cocaine received by and attributable to Dawn Cook, not Stokes. (JA p. 474)

The Court of Appeals vacated and remanded the sentencing of Dawn Cook due to an absence of a more

complete explanation of the District Court's findings regarding the amount of cocaine attributable to her. (App. at 15a and 22a)

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEAL'S DECISION IS IN CONFLICT WITH A DECISION OF THE SUPREME COURT REGARDING SENTENCING

As discussed during oral argument and recognized by the Court of Appeals in its decision, the use of post-trial testimony to attribute certain amounts of cocaine to Stokes for sentencing purposes has emerged as an issue since the inception of this case. (App. at 3a) It is Stokes' position that the Court of Appeals affirmed error in sentencing thereby violating Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

Initially, it should be noted, the District Court sentenced Stokes without the benefit of Apprendi, sentencing having occurred in 1999. It is therefore also Stoke's position that the District Court would not have sentenced Stokes to 324 months when the maximum sentence under Apprendi should have been no more than 240 months had the District Court been operating under the sentencing directives of Apprendi.

The District Court imposed concurrent sentences based upon the jury verdict which did not determine the total amount of cocaine involved in any of the referenced transactions. Without such a determination, the maximum penalty for conspiracy to distribute cocaine is twenty years (240 months). 21 U.S.C. Section 841(b)(1)(C). Under Apprendi, a trial court imposing sentence cannot go beyond

the maximum statutory penalty when the amount of cocaine involved has not been determined by the jury. see also U.S. v. Buckland, 259 F.3d 1157 (9th Cir. August 2001).

The Sixth Circuit has distinguished the circumstance where multiple convictions would increase the sentence if run consecutively, approving of sentences greater than the statutory maximum if the trial court could have imposed consecutive sentences, ignoring, as was done in this case, the fact that the District Court did not impose consecutive sentences but concurrent sentences for the multiple convictions, (App. at p. 22a); see U.S. v. Neuhausser, 241 F.3d 460 (6th Cir. 2001) and U.S. v. Page, 232 F.3d 536, 545 (6th Cir. 2000), *cert. den.* 121 S. Ct. 2202 (2000). The result of the Sixth Circuit's exception to Apprendi is that District Courts must continue to the unconstitutional practice of post-trial attribution of amounts based upon a preponderance of the evidence standard and sentencing defendants to incarceration greater than the maximum sentence regardless of a determination that sentences for multiple convictions have been set to run concurrently. In other words, in the Sixth Circuit, concurrent means "concurrent plus" based upon any post-trial evidence the government may produce. The result is particularly unfortunate, where as in this case, the District Court Judge was clearly not satisfied and did not agree with the findings of the Pre-Sentencing Investigation Report and further, there was confusion and mistakes made concerning the amounts attributable to Stokes. In addition it should be noted, the District Court at hearing on August 30, 1999, clearly stated the intention to give Stokes the very minimum sentence that could be given under the law, (JA p. 496) The Sixth Circuit's exception to Apprendi has thwarted that intention.

Pursuant to 28 U.S.C. Section 841, the statutory penalty is based upon the amount of cocaine determined by the jury to have been attributable to a defendant. This essential elemental factor is absent from the jury verdict in this case and under the directives of Apprendi cannot expose Stokes to a greater penalty than 20 years.

THE COURT OF APPEALS' DECISION IS ALSO IN CONFLICT WITH THE SENTENCING GUIDELINES AND OTHER CIRCUIT COURTS OF APPEALS' DECISIONS WITH RESPECT TO SENTENCING.

The sentence imposed on Stokes was excessive, especially in light of the undetermined amount of cocaine attributed to him by the jury. Stokes was not the organizer or leader of a criminal activity involving five or more participants as maintained in the Pre-Sentence ivestigation Report disclosed to Stokes April 29, 1999. At most, there were a total of four "participants" in the offenses, not more than five. At the evidentiary hearing, the government did not provide the District Court with a certified copy a felony conviction alleged to have been entered in Carter County, Tennessee, and the alleged conviction should therefore not have added to Stokes criminal history point total.

The District Court found and the Court of Appeals affirmed Stokes' total offense level to be 36 and his criminal history category to be VI. These numbers were incorrectly higher than they should have been and resulted in an erroneously enhanced sentence being imposed on Stokes for his convictions in this case. A total offense level of 28 should have been determined to apply to Stokes with a criminal history category of V being proper. The custody guideline

range of 130 - 162 months rather than 324 - 405 months was therefore the correct range. USSG Section 5, Part A, Sentencing Table. (App. at 53a)

Following the evidentiary hearing for sentencing on July 26, 1999, the District Court found Stokes would be held accountable for 5 to 15 kilograms of cocaine based his documented transactions which involved relatively small quantities. The Court of Appeals affirmed the District Court indicating the District Court had apparently credited the testimony of Agent Mike Steadman which, in actuality, pertained to cocaine received by and attributable to Dawn Cook, not Stokes. (App. A at 16a; JA 474) As set forth in the Joint Appendix for the Sixth Circuit, the testimony the Court of Appeals indicated the District Court must have relied on reads as follows:

> By Mr. Smith:
>
> Q. Mr. Steadman, did Mr. Brummitt also discuss the amount of cocaine Ms. Dawn Cook was involved in?
>
> A. Yes. He advised me that starting in November '97 that Dawn Cook was selling approximately 5 ounces of cocaine per week.
>
> (JA 474)

Reviewing the amounts for which proof was introduced by the government at trial, no more than 11 ounces was shown to be attributable to Stokes. Converting ounces to kilograms (3.527 ounces per kilogram) yields a total of approximately 3.12 kilograms of cocaine. Pursuant the sentencing Guidelines, USSG Section 2D1.1(c)(6) (App. at

48a), criminal responsibility for at least 2 kilograms but less than 3.5 kilograms of cocaine garners an offense level of 28.

Increasing the quantity of cocaine for which Stokes should be held accountable beyond that associated with his direct participation in the alleged conspiracy is not appropriate under the guidelines. A court is restricted to the scope of the criminal activity a defendant agreed to jointly undertake. USSG Section. 1B1.3(a)(1)(B) (App. at 46a)

> [B]ecause "the scope of conduct for which a defendant can be held accountable under the sentencing guidelines is significantly narrower than the conduct embraced by the law of conspiracy," a sentencing judge may not, without further findings, simply sentence a defendant according to the amount of narcotics involved in the conspiracy.
>
> U.S. v Okavfor, 996 F.2d 116, 120-121 (6th Cir. 1993) *cert. den.* 116 S,Ct. 1580, 134 L.Ed,2d 677 (1996) quoting U.S. v. Perrone, 936 F.2d 1403, 1416 (2nd Cir. 1991).

The trial court must make, "individualized findings regarding the scope of the conspiracy and the duration and nature of each defendant's participation in the scheme," must be determined. U.S. v. Meacham, 27 F.3d 214, 217 (6th Cir. 1994), *cert. den.* 136 L,Ed.2d 415 (1996). A preponderance of reliable evidence must establish both scope of the criminal activity the defendant agreed to jointly undertake and reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity in order to fix upon a proper determination of criminal responsibility,

U.S. v. Critton., 43 F.3d 1089, 1098-1099 (6th Cir. 1995), *cert.den.* 131 L.Ed.2d 873, 11.5 S.Ct. 1087 (1995).

"[W]hen choosing between a number of plausible estimates of drug quantity, a court must err on the side of caution," U.S. v. Walton, 908 F.2d 1289, 1302 (6th Cir, 1990), *cert. den.* 498 U.S. 990 (1990).

The government requested and the District Court added to 4 points to the offense level under USSG Section 3B1.l(a) (App. at 49a) for a defendant found to be an organizer or leader of a criminal activity involving five or more participants. It was clear error in sentencing for the District Court to have added the 4 points. Based upon the convictions, a total of four persons, Stokes, Acie Mullins, Carol Cook and Dawn Cook were found to be participants in the criminal activity. Charles "Tiny" Mosrie could not be counted as a participant for the reason the "Application Notes" specifically exclude persons who are not criminally responsible for the commission of the offense, for example, undercover law enforcement.

The government failed to prove Stokes managed or supervised at least five people. U.S. v. Ward, 37 F.3d 243, 249 (6th Cir. 1994) *cert. den.* 131 L.Ed,2d 240 (1996) Proof such as the defendant controlling the method by which the purchaser sold the cocaine or otherwise controlled the distribution, channels is required. *Id.;* See also U.S. v, Patrick, 965 F.2d 1390, 1396 (6th Cir. 1992)

Stokes objected to the listing of a Carter County conviction set forth in paragraph 46 of the Pre-Sentencing Investigation Report and the government failed to introduce an authenticated (certified) copy, (JA pp. 565-67) Accordingly, 3 points should be deducted from criminal,

history point total and Stokes' category reduced from VI to V. (JA pp. 538-55; JA pp. 495)

THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS OF CIRCUIT COURTS OF APPEALS WITH RESPECT TO THE EVIDENTIARY AND JURY INSTRUCTION ISSUES.

The District Court allowed inadmissible hearsay evidence, primarily statements of alleged co-conspirators who were not making statements relevant to the furtherance of the alleged conspiracy, to be presented to the jury in the form the testimony of law enforcement personnel and confidential informants repeating what they had heard someone else say about Stokes. Moreover, prejudicial unsworn excerpts from tape-recorded conversations of Stokes' daughter were played for the jury in order to convict Stokes. Additionally, it was plain error to omit a buyer/seller instruction for the jury.

It is an abuse of discretion and reversible error to admit hearsay statements to purportedly link a defendant to a conspiracy where the government has not laid the proper foundation showing the statement had been made in the furtherance of the conspiracy. U.S. v. McCormell, 988 F.2d 530, 534 (5th Cir. 1993). Mere conversation between conspirators is not admissible under the exception. *Id.*, at 533, citing and relying upon U.S v. James, 510 F.2d 546, 549 (5th Cir. 1975)(*en banc*).

> In order for the evidence of the conspirators' illegal acts to have been relevant, the government must have provided evidence of a connection between Appellants and the conspiracy of which they were accused of

> being a part. *See* Lutwak v. United States, 344 U.S. 604, 608,...The introduction of inadmissible evidence of criminal acts of Defendants associates runs the risk of a finding of guilt by association. This Court has repeatedly noted the highly prejudicial effect of the introduction of evidence which suggests guilt by association.
>
> McConnell, at 534.

The District Court's assumption at the outset of this case that a conspiracy existed based upon the hearsay testimony of what a co-conspirator said was clear error warranting reversal. *Id.*, at 536.

> An accused's knowledge of and participation in an alleged conspiracy are preliminary facts that must be established before extrajudicial statements of a co-conspirator can be introduced into evidence.
>
> U.S.v. Silverman, 561 F.2d 571, 576 (9th Cir 1988), citing Bourjaily v. U.S. 483 U.S. 171, 107 S.Ct. 2775, 2778, 97 L.Ed.2d 144 (1987).

Unless there is an agreement binding parties in the illicit enterprise, the mere fact one buys drugs is not sufficient to prove a conspiracy. U.S. v. Mims, 92 F.3d 461,465 (7th Cir. 1996). The failure to properly instruct the jury in this case amounted to plain error. *Id.*, at 465. The mere agreement to buy cocaine supplied by another does not amount to conspiracy, *Id.* Even one who is a frequent purchaser is not necessarily a conspirator. *Id.* Proof that one purchases drugs from another for the purpose of reselling the drugs is also not

necessarily sufficient to prove a conspiracy absent the agreement binding parties to the illicit enterprise. *Id.*

Evidence that only establishes a buyer/seller relationship is not sufficient to support a conspiracy conviction. U.S. v. West, 15 F.3d 119, 121 (8th Cir. 1994). In order to sustain a conspiracy conviction the government must put forth evidence tending to prove the defendant entered into an agreement and knew the agreement had the specific unlawful purpose charged in the indictment. U.S. v. Thomas, 114 F.3d 403,405 (3d Cir. 1997); See also U.S. v. Patrick, 965 F.2d 1390 (6th Cir. 1992).

It is plain error for a trial court to fail to give a "buyer/seller" instruction, U.S. v. Mires, 92 F.3d 461,465 (7th Cir. 1996); U.S. v. Douglas, 818 F.2d 1317, 1320 (7th Cir. 1987). A buyer and seller of narcotics are not engaged in a conspiratorial relationship sufficient to justify a conviction for conspiracy. Douglas, at 1321. A defendant has a right to a clear instruction on this point. *Id.* The jury instructions in this case regarding conspiracy do not contain such a "buyer/seller" limiting instruction.

A defendant cannot be convicted of conspiracy merely because of association with members of conspiracy who also happened to be family members. U.S. v. Ledezma, 26 F.3d 636,640 (6th Cir. 1994), *cert. den,* 133 L.Ed.2d 529, 116 S.Ct. 681 (1995) citing and relying upon U.S.v. Lee, 991 F.2d 343,348 (6th Cir. 1993).

In line with the discussion above regarding the hearsay statements of a co-conspirator, the hearsay statements of Dawn Cook regarding her "Daddy" were inadmissible since they were not in the furtherance of an alleged conspiracy.

The tape-recorded excerpts of Dawn Cook, in order to be admissible, had to have been authenticated, with the whole tapes at least being made available, and there being a good reason if the original is not produced. U.S. Segines, 17 F.3d 847, 854 (6th Cir. 1994) *cert. den.* 136 L.Ed.2d 192 (1996). Otherwise, if the foregoing requisites are not satisfied, reversal is warranted. *Id.* The unsworn out of court statements of Dawn Cook are certainly hearsay with respect to anything Stokes is supposed to have said to her and are not covered by any hearsay exception. The taped excerpts and their references to "Daddy" are highly prejudicial, intended to convict Stokes through improper inference and innuendo.

A "buyer/seller" jury instruction as noted in the discussion above, should also have been given to the jury on the aiding and abetting distribution charges. To prove aiding and abetting in this case, the government must show Stokes knew the principals possessed cocaine with the intent to distribute it. Acie Mullins, Charles "Tiny" Mosier and Dawn Cook were known users and wanted cocaine for themselves. Any sales to them did not contemplate distribution.

CONCLUSION

Pursuant to Rule 10 of the Rules of the Supreme Court of the United States and based upon the foregoing legal authority and argument, it is respectfully submitted and requested that this Honorable Court grant the Writ of Certiorari. It is respectfully submitted that the United States Court of Appeals for the Sixth Circuit has entered a decision in conflict with decisions of the United States Supreme Court and other United States Courts of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed July 2, 2001]

Nos. 99-6283, 99-6285, 99- 6354

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
DAWN COOK; STOKES COOK; TERRY BRIDGEMAN,
Defendant-Appellant.

JUDGES: NORRIS and COLE, Circuit Judges; and STEEH, District Judge. *

* The Honorable George Caram Steeh, III, United States District Judge for the Eastern District of Michigan, sitting by designation.

Appeal from the United States District Court
for the Eastern District of Tennessee at Greenville
No. 98-00023
Thomas G. Hull, District Judge

OPINION

R. GUY COLE, JR., Circuit Judge.

Before this Court are the consolidated appeals of three defendants that were indicted and convicted of various federal narcotics violations for their participation in a multi-member drug conspiracy in eastern Tennessee. Defendant-Appellant Dawn Cook appeals from the sentence imposed following her guilty plea to conspiracy to distribute cocaine. Defendant-Appellant Stokes Cook ("Stokes Cook" or "Cook") appeals from his jury convictions and sentences for one count of conspiracy to possess with the intent to distribute cocaine and two counts of aiding and abetting the distribution of cocaine hydrochloride. Defendant-Appellant Terry Bridgeman appeals from his jury convictions and sentences for one count of conspiracy to possess with the intent to distribute cocaine hydrochloride and one count of distribution of cocaine hydrochloride.

Dawn Cook assigns error to the district court's determination, for purposes of sentencing, that she was responsible for distributing at least 3.5 but less than 5 kilograms of cocaine, instead of the 1.8 kilograms of cocaine that she argues was supported by the evidence. Because the district court failed to make sufficiently individualized findings concerning the extent to which Dawn Cook facilitated other drug transactions, we **VACATE** her sentence and **REMAND** for resentencing.

Stokes Cook raises challenges of: (1) the sufficiency of the evidence presented in support of the jury's guilty finding on each count of conviction; (2) the district court's

admission into evidence of his co-conspirators' hearsay statements; (3) the district court's clearly erroneous determination of the drug quantity attributable to him over the course of the conspiracy; (4) the district court's plainly erroneous application of a four-level aggravating role enhancement; (5) the district court's adoption of the probation officer's incorrect determination of his criminal history; and (6) the district court's sentence of him in excess of the maximum statutory penalty, in violation of *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). We **AFFIRM** the district court on all issues.

Terry Bridgeman assigns error to the district court's admission into evidence, over his objection, of an out-of-court statement by co-conspirator Dawn Cook that he had previously sold cocaine to another co-conspirator. Because the district court properly admitted Dawn Cook's statement pursuant to FED. R. EVID. 801(d)(2)(e) as a statement of a co-conspirator during the course and in furtherance of the conspiracy, we **AFFIRM** the district court on this point.

I. BACKGROUND

The Tennessee Bureau of Investigation ("TBI") began an investigation in August 1997 of the cocaine-distribution activities of Acie Mullins. Evidence presented at trial revealed that from June 1996 until July 22, 1998, Mullins collected money from investors, traveled to New York and Florida to purchase cocaine, and returned to the Eastern District of Tennessee to distribute it. One investor, Stokes Cook, purchased cocaine from Mullins during this period and then, with the assistance of his wife, Carol Cook, and his daughter, Dawn Cook, sold it to interested buyers. Mullins and Stokes

Cook bought cocaine from each other on several occasions until their arrests in 1998. Also involved in this scheme were Terry Bridgeman and a number of other co-conspirators, many of whom were, like Stokes Cook, members of the Ghost Riders Motorcycle Club.

On August 5, 1998, a grand jury in the Eastern District of Tennessee named Dawn Cook, Stokes Cook, Terry Bridgeman, and three other individuals in a thirteen-count indictment charging various violations of federal narcotics laws, including conspiracy to distribute and possess with the intent to distribute cocaine hydrochloride, in violation of 21 U.S.C. § 846, and distribution of cocaine hydrochloride, in violation of *21 U.S.C. § 841(a)(1)*. Dawn Cook entered a plea of guilty to Count One of the indictment (conspiracy to distribute cocaine) on February 22, 1999. Stokes Cook and Terry Bridgeman proceeded to trial on March 4, 1999. A jury convicted them on March 9, 1999.

Stokes Cook, Dawn Cook, and Terry Bridgeman each filed objections to their respective presentence investigation reports ("PSI"), which were resolved by the district court in an August 23, 1999, order. The district court sentenced Dawn Cook to eighty-seven months' imprisonment, but, on the motion of the Government, subsequently reduced her term of imprisonment to forty-four months. The district court sentenced Stokes Cook to 324 months' imprisonment and Terry Bridgeman to twenty-seven months' imprisonment. Their timely appeals followed.

II. DISCUSSION

A. Sufficiency of the Evidence

1. Standard of Review

We review a challenge to the sufficiency of the evidence to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979). A defendant making such a claim bears "a very heavy burden," *United States v. Vannerson,* 786 F.2d 221, 225 (6th Cir. 1986), as "all evidence must be construed in a manner most favorable to the government," *United States v. Green,* 548 F.2d 1261, 1266 (6th Cir. 1977). This is particularly so since "once a conspiracy has been proven, only slight evidence is necessary to implicate a defendant as a participant in that conspiracy if the evidence shows the connection beyond a reasonable doubt." *United States v. Braggs,* 23 F.3d 1047, 1051 (6th Cir. 1994).

2. Analysis

Stokes Cook challenges the sufficiency of the evidence underlying his convictions. He argues that because the Government established at trial only that he shares a familial relationship with his daughter Dawn Cook and that he had a buyer-seller relationship with Mullins, the jury's guilty verdict as to the conspiracy count cannot stand. He further argues that the jury's guilty verdict as to the aiding-and-abetting count also lacks sufficient support, because the

Government failed to show both that Stokes Cook knew that the other co-conspirators possessed cocaine with the intent to distribute it and that any drug sales by Stokes Cook to Mullins, Mosier, or Dawn Cook -- all of whom are known drug users -- were not intended for their personal use. Neither argument has merit.

Before the jury was abundant evidence provided by Cook's co-conspirators (beyond that establishing a familial relationship between Stokes Cook and Dawn Cook) on which it could have reasonably found Stokes Cook guilty of both counts. Co-defendant Mullins testified that he and Cook were engaged in the distribution of cocaine, and that, for a period of time, they sold cocaine to each other. Co-defendant David Cross and confidential informant Charles Mosier both testified that they observed an initial meeting between Cook and Mullins, the purpose of which, according to Mullins, was to arrange a cocaine purchase in Florida.

The jury also had before it the testimony of various federal and local law enforcement agents establishing the guilt of Stokes Cook. TBI Special Agent Jim Williams testified that he acted in an undercover capacity to infiltrate the drug distribution ring; that Mullins told him that his supplier was a member of the Ghost Riders Motorcycle Club; and that, on another occasion, he overheard a cell phone conversation between Mullins and Cook discussing the arrangements for a cocaine deal. TBI Special Agent Mike Taylor and Kingsport, Tennessee, police detective Brian Bishop testified that their surveillance of Williams revealed that Stokes Cook was likely involved in at least two drug transactions with Mullins. Finally, undercover TBI Special Agent Ken Rhodes testified that over a period of time he made several cocaine purchases

from Dawn Cook. During one or more of these transactions, Dawn Cook indicated that her father purchased cocaine and then supplied her with a portion of it to distribute; Dawn Cook's statement was confirmed by several audio-recorded conversations involving Dawn Cook, Mosier, and Rhodes, all of which were played at trial.

On the basis of the foregoing evidence, and viewing it in the light most favorable to the Government, we conclude that any rational factfinder could have found the essential elements of the charged offenses beyond a reasonable doubt. Stokes Cook's argument therefore must fail.

B. Co-Conspirator Hearsay Statements

1. Standard of Review

We review for an abuse of discretion a district court's ruling on whether certain evidence constitutes hearsay. *See Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 716 (6th Cir. 1999) ("In disregard of our heretofore well-settled precedent that hearsay evidentiary rulings are reviewed *de novo*, we shall [in accordance with the U.S. Supreme Court's holding in *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141, 139 L. Ed. 2d 508, 118 S. Ct. 512 (1997)] review the district court's ruling for an abuse of discretion."):

2. Analysis

a. Terry Bridgeman

Hearsay evidence may be admitted pursuant to FED. R. EVID. 801(d)(2)(e) where the hearsay proponent

demonstrates by a preponderance of the evidence that a conspiracy existed, that the defendant against whom the hearsay is offered was a member of the conspiracy, and that the hearsay statement was made in the course and in furtherance of the conspiracy. *See United States v. Vinson,* 606 F.2d 149, 152 (6th Cir. 1979). Pursuant to this exception, the district court permitted the admission of evidence that Dawn Cook, in response to an inquiry made by confidential informant Mosier, identified Bridgeman as an individual who had previously sold cocaine to co-conspirator Acie Mullins. Specifically, Special Agent Rhodes testified that on one occasion, when he and Mosier went to Dawn Cook's home to purchase cocaine, Dawn Cook and Mosier began to talk about Bridgeman: "Mr. Mosier asked how much Terry Bridgeman charged Acie for an ounce, and she said 800." Bridgeman argues that admission of this testimony at trial was improper, because his alleged statement was not in furtherance of the conspiracy.

We disagree. Although Bridgeman urges a narrower construction of "in furtherance of the conspiracy," we have previously declined to so hold. *See United States v. Monus,* 128 F.3d 376, 392-93 (6th Cir. 1997) (noting that "statements which prompt a listener to act in a manner that facilitates the carrying out of the conspiracy" or "identify participants and their roles in the conspiracy" are properly considered statements "in furtherance of the conspiracy" and admissible under 801(d)(2) (citations and internal quotation marks omitted)). Because, at a minimum, Dawn Cook's statement was an identification of a participant of the conspiracy

(Bridgeman) and his role in that conspiracy (selling drugs to interested buyers), Bridgeman's claim must fail.[1]

b. Stokes Cook

Stokes Cook argues that the district court erroneously permitted Special Agent Williams to testify about statements allegedly made to Williams by Mullins concerning Mullins's cocaine supplier, who was a member of the Ghost Riders Motorcycle Club (of which Stokes Cook is a member). He also challenges the district court's admission of Mosier's testimony that Dawn Cook, while selling cocaine to him, stated that Stokes Cook was the supplier of her cocaine and the individual who controlled its price, distribution, and delivery. Cook's claims are without merit. Williams's testimony was properly admitted because Williams was merely relating a conversation with an unindicted co-conspirator whose statement was made during an act of the conspiracy (a drug sale by Mullins to Williams) in furtherance of the conspiracy (to ensure Williams' continued purchases by assuring him that the cocaine was of high quality because it was provided by the Ghost Riders). Similarly, Mosier's testimony concerning his conversations with Dawn Cook (and the audiotapes memorializing the same) were properly admitted, because they involved statements by a co-conspirator, were made during the course of the conspiracy, and were in furtherance of the conspiracy (by assuring Mosier

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[1] For similar reasons, we cannot conclude that the district court erred when it permitted admission of hearsay statements of Dawn Cook in which she referred to her supplier as "Daddy."

that she had access to a continuous supply of inexpensive cocaine).

Some of the alleged conversations between Mosier and Dawn Cook were captured on audiotapes, which were admitted at trial. Stokes Cook contends that the district court's admission of these audiotapes was error, both because only excerpted portions were admitted, and because they contained hearsay statements concerning him. Although Cook filed a continuing objection to the Government's use of hearsay statements in its case-in-chief, he did not raise a specific objection to the Government's use only of excerpted portions, and thus we review this claim for plain error. *See United States v. Koeberlein,* 161 F.3d 946, 949 (6th Cir. 1998). There is no question that the Government laid a proper foundation for introduction of the excerpts, eliciting testimony from Special Agent Rhodes that he was a party to the taped conversations, that the conversations accurately described the events discussed therein, that he recognized the voices on the recordings, and that he had used the original tapes to create the tapes containing the excerpts. The Government also met its burden under FED. R. EVID. 1006 by allowing Cook an opportunity to review the unaltered audiotapes. Thus, we do not believe it was plain error for the district court to allow use of audiotape excerpts. *See United States v. Denton,* 556 F.2d 811, 816 (6th Cir. 1977) (noting that admission of a composite tape of several recordings was appropriate because defense counsel had previously had an opportunity to review the tapes in question and because the Government had laid a proper foundation establishing the tapes' accuracy).

Stokes Cook's final challenge concerns the district court's decision to permit the Government to introduce

testimony, subject to its later demonstration that a conspiracy existed. Having previously recognized that employment of such a procedure may be appropriate, we disagree. *See Vinson,* 606 F.2d at 153.

C. Jury Instructions

1. Standard of Review

When reviewing a jury instruction to which a defendant failed to object at trial, such as the one at issue here, we review only for plain error, which requires us to determine "whether the instructions, when taken as a whole, were so clearly wrong as to produce a grave miscarriage of justice." *United States v. Sanderson,* 966 F.2d 184, 187 (6th Cir. 1992) (citation omitted).

2. Analysis

Stokes Cook argues that the district court erred when it failed to give a so-called "buyer-seller instruction" to the jury. Such an instruction would have permitted the jury to consider that the cocaine in Cook's possession was for his own personal consumption, and not for the purpose of sale or distribution in a drug conspiracy; that is, the fact that there was an established buyer-seller relationship, without more, did not constitute a conspiracy. We reject Cook's argument. A buyer-seller instruction is unnecessary "if the judge has given a complete instruction reciting all the elements of conspiracy and requirements for membership in a conspiracy." *Riggs v. United States,* 209 F.3d 828, 833 (6th Cir. 2000). Only in the absence of such a "complete instruction" is a defendant entitled to a buyer-seller

instruction. *See id.* Because the district court in the instant case provided a sufficient conspiracy instruction, no buyer-seller instruction was required. Thus, Cook cannot demonstrate that the entire set of jury instructions produced a miscarriage of justice.

D. Sentencing-Related Errors

1. Standard of Review

A district court's application of the facts to the Sentencing Guidelines is a mixed question of law and fact that we review de novo. *See Razavi v. Commissioner,* 74 F.3d 125, 127 (6th Cir. 1996). We review for clear error a district court's factual findings concerning the quantity of narcotics for which a defendant is to be held criminally responsible. *See United States v. Meacham, 27 F.3d 214, 216 (6th Cir. 1994).* Similarly, we will disturb a district court's determination of a defendant's role in the offense only for clear error. *See United States v. Walker,* 160 F.3d 1078, 1091 (6th Cir. 1998). A factual finding is clearly erroneous when "although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *United States v. Gort-DiDonato,* 109 F.3d 318, 320 (6th Cir. 1997) (citation and internal quotation marks omitted). In the context of an alleged *Apprendi* violation, where there has been no objection to a district court's determination of drug quantities, such as in the instant case, we review for plain error. *See United States v. Page,* 232 F.3d 536, 543 (6th Cir. 2000).

2. Analysis

a. Drug Attribution

i. Dawn Cook

The district court in its August 23, 1999, order ruling on Dawn Cook's objections to the PSI, made the following findings:

> DEA Special Agent Mike Steadman testified that, to the best of his knowledge, Ms. [Dawn] Cook was distributing approximately two ounces of cocaine per week. She also facilitated other transactions and relayed communications between Stokes Cook and other buyers. This extends the scope of her agreement in the conspiracy to at least 3.5 but less than 5 kilograms of cocaine.

In making such findings, the district court rejected the probation officer's recommendation that she should be held responsible for distribution of at least five, but less than fifteen, kilograms of cocaine.

Dawn Cook now argues that the district court's findings lacked factual support and should be set aside. She asserts that she should have been held responsible for a total drug quantity of 1.8 kilograms, which would have yielded a scoring level of twenty-six prior to any offense-level adjustments. In support of her argument, she points to evidence adduced at trial -- which the district court apparently adopted, as evidenced by the language of its order -- that she distributed two ounces of cocaine per week for the duration of her six-month participation in the conspiracy (from

November 1997 until April 1998).[2] While she recognizes that the district court attributed to her not only cocaine that she distributed but also cocaine-distribution transactions that she facilitated, she nevertheless contends that the district court failed to make the requisite individualized factual findings concerning her involvement in the facilitation of other drug transactions to warrant its departure from the 1.8 kilograms calculation that she suggests the evidence supported. While Dawn Cook never explains how she arrived at 1.8 kilograms as the proper amount of drugs attributable to her, we agree that the district court failed to provide proper support for its findings.

Findings on which a defendant's sentence is based, including the district court's relevant conduct approximation, need only be supported by a preponderance of the evidence. *See United States v. Walton,* 908 F.2d 1289, 1301 (6th Cir. 1990). Although a sentencing court must consider "those quantities of drugs not specified in the counts of conviction that are 'part of the same course of conduct or common scheme or plan,'" U.S. Sentencing Guidelines Manual [hereinafter "U.S.S.G." or "Guidelines"] § 1B1.3(a)(2); the court is urged, where the amount is uncertain, "to err on the side of caution and only hold the defendant responsible for that quantity of drugs for which the defendant is more likely than not *actually* responsible," *Meacham,* 27 F.3d at 216 (citations and internal quotation marks omitted). We also note

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[2] Although Dawn Cook suggests that she participated in the conspiracy only from November 1997 until April 1998, the factual proffer submitted by her in connection with her plea agreement states that her involvement began "during approximately the month of June, 1996, and continued to on or about July 22, 1998."

that the defendant need not be personally or directly responsible for sale of the amount attributed to her: "The Sentencing Guidelines provide that the defendant's relevant conduct, in the case of a jointly undertaken criminal activity, includes 'all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity' that occurred during the commission of the offense of conviction." *United States v. Hernandez,* 227 F.3d 686, 698 (6th Cir. 2000).

The Government argues that the district court's findings relied upon the collective testimony of co-defendant Mullins, Special Agents Williams and Rhodes, and confidential informant Mosier, which demonstrated that "Cook distributed two to three kilograms of cocaine per month for a period of about nine months. . . . [and] that Dawn Cook was distributing at least two ounces of cocaine per week during the same period." Taking the Government at its word, then, Dawn Cook would have distributed approximately eighty ounces of cocaine during this nine-month period (assuming she distributed two ounces each week for forty weeks), which would amount to roughly 2.27 kilograms. *See* U.S.S.G. § 2D1.1, cmt. n.10 (1998) (setting forth applicable measurement conversion table). While we note that it is certainly possible, and perhaps even likely, that Dawn Cook facilitated the distribution of an additional 1.23 kilograms to warrant the district court's conclusion that she was criminally responsible for distribution of at least 3.5 kilograms, we simply do not (and cannot) know, however, since the district court failed to provide a more complete explanation of its findings. Accordingly, we **VACATE** Dawn Cook's sentence and **REMAND** for resentencing.

ii. Stokes Cook

The drug attribution issue raised by Stokes Cook is more easily resolved, and we find that the district court adequately supported its findings. We are obligated to sustain the district court's finding if, upon review of the entire record, we conclude that "it was supported by 'some minimum indicium of reliability beyond mere allegation.'" *Hernandez,* 227 F.3d at 699. We believe that it was. It is evident to us that the district court erred on the side of caution in rejecting the PSI's recommendation of sixteen to twenty-four kilograms. The district court apparently credited Daniel Brummit's statement (as related by Agent Steadman) that Stokes Cook was supplied with five ounces per week, and concluded, as we do, that Stokes Cook received a weekly supply of five ounces of cocaine for the duration of the alleged conspiracy (June 1996 until July 22, 1998, according to the indictment). The district court properly rejected Dawn Cook's estimate that her father sold one kilogram of cocaine every two to three weeks, noting that no witness had corroborated Dawn Cook's testimony, that Stokes Cook was never found to be in possession of such an amount, and that his documented drug-selling transactions involved "relatively small quantities." Thus, relying only on Agent Steadman's testimony that Stokes Cook sold (or was supplied with) five ounces of cocaine per week from June 1996 to July 22 1998, then on that basis alone, we could determine, as the district court apparently did, that Stokes Cook received, with the intent to distribute, a total of 555 ounces (assuming five ounces were sold over a 111-week period) or 15.7 kilograms, an amount slightly higher than the district court's finding. We

thus find no error in the district court's attribution to Cook of five to fifteen kilograms of cocaine.

b. Aggravating Role Enhancement

A four-level, aggravating role (or role-in-the-offense) sentencing enhancement is appropriate "if the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). Proper application of the enhancement requires a showing that the defendant was "the organizer, leader, manager, or supervisor of one or more other participants." U.S.S.G. § 3B1.1, cmt. n.2 (1998); *United States v. Munoz,* 233 F.3d 410, 416 (6th Cir. 2000). In recommending the enhancement, the probation officer who prepared Stokes Cook's PSI made the following findings:

> [Stokes Cook] was a leader in the drug conspiracy that involved Carol Cook, Dawn Cook, Terry Bridgeman, David Cross, Alejandro Romero, Acie Mullins, Charles "Tiny" Mosier, as well as an additional confidential informant. Evidence reflects that the defendant made decisions on what to charge for the drugs, whom to sell to and how much to sell. He also made numerous trips to Myrtle Beach, South Carolina, and North Wilkesboro, North Carolina, to pick up large amounts of cocaine. Therefore, the base offense level is increased by four levels.

Stokes Cook argues that the district court erred in applying this enhancement, because the Government failed to

prove any of the following: (1) that the conspiracy consisted of at least five participants, as only four people were convicted (Stokes Cook, Carol Cook, Dawn Cook, and Acie Mullins), and Mosier, as an undercover informant, was not a criminally responsible participant in the conspiracy; (2) that he organized or led at least five people; or (3) that he controlled the method by which the purchaser sold the cocaine or otherwise controlled the distribution channels, as is required by *United States v. Patrick,* 965 F.2d 1390, 1396 (6th Cir. 1992). Because Stokes Cook failed to raise this objection before the district court, we may review this claim only for plain error.[3]

As a threshold matter, we note that the Guidelines do not require that the alleged organizer have managed or supervised at least five people. *See* U.S.S.G. § 3B1.1, cmt. n.2 ("To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of *one or more* other participants." (emphasis added)). Neither do the Guidelines set forth a requirement that only convicted conspirators may be counted to establish that a defendant is properly subject to an aggravating role

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[3] Cook argues that in fact he did object to the district court's aggravating role enhancement when in his "Objections to P.S.I. Report," filed May 10, 1999, he stated: "Defendant disagrees and objects to the computation of his time and it is his contention that the level stated in the P.S.I. report is wrong, excessive and improperly calculated." While we are not persuaded that Cook made a sufficiently specific objection to preclude plain-error review of this issue, we need not resolve this question, because even under the more permissive clear-error standard, the district court's enhancement was appropriate.

enhancement. To the contrary, the Guidelines expressly include criminally responsible participants, regardless of whether they have themselves been convicted. *See* U.S.S.G. § 3B1.1, cmt. n.1.

Our review of the record suggests that the Government did establish that the alleged conspiracy consisted of at least five participants. Stokes Cook, Dawn Cook, and Terry Bridgeman were convicted participants. David Cross and Alex Romero were also participants; although neither of them was ultimately convicted, the district court could have reasonably concluded by a preponderance of the evidence that they were criminally responsible. The district court, therefore, did not clearly err in concluding that the conspiracy consisted of at least five participants.

Cook's position that the Government failed to demonstrate that he exercised control over the cocaine sales methods or distribution channels is similarly without merit. First, Cook's reliance on *Patrick* is misplaced, as *Patrick* involved the Government's burden in establishing that the defendant was part of a continuing criminal enterprise pursuant to *21 U.S.C. § 848,* and had nothing whatsoever to do with the altogether different standard for application of an aggravating role enhancement. Even if the Government were required to make a showing that Cook organized or led the sales methods or distribution channels -- and we emphasize that it is not -- it would easily have met its burden. There was ample evidence presented at trial that Cook (1) served as one of a number of investors in a drug ring that purchased cocaine from Florida and New York; (2) coordinated with Mullins the purchase of cocaine from various drug suppliers, including Terry Bridgeman; (3) traveled to North and South Carolina to

purchase cocaine from at least two suppliers; (4) sold cocaine himself or served as a supplier to Mullins, who then sold the drugs provided by Cook; (5) supervised the pricing, delivery, and distribution of cocaine by his daughter, Dawn Cook; and (6) acted in concert with his wife, Carol Cook, to store cocaine in his truck and his house.

Because the district court's application of an aggravating role enhancement was well-founded and cannot be said to have been erroneous, Cook cannot satisfy the first prong of our plain-error inquiry, and his claim therefore must fail.

c. Criminal History Determination

Stokes Cook filed an objection to his PSI, arguing that the probation officer erroneously listed therein two prior Carter County, Tennessee, drug convictions. Inclusion of those convictions resulted in the addition of three criminal history points, which increased his criminal history category from V to VI. Because the Government failed to prove the conviction at the sentencing hearing by introducing a certified copy of the conviction, he argues, the district court erred by including it in its calculation of the appropriate sentence.

Cook's argument is without merit. His assertion that the Government did not introduce a certified copy of his prior conviction obscures the fact that the district court did in fact receive a certified copy from the probation officer. The Guidelines make clear that a district court, in determining the relevant facts for sentencing purposes, may consider any information, "so long as it has sufficient indicia of reliability to support its probable accuracy." U.S.S.G. § 6A1.3, cmt.

The district court's use of a certified copy of conviction provided a sufficiently reliable means of establishing Cook's prior convictions. We find no error.

d. *Apprendi v. New Jersey*

If the jury has not found beyond a reasonable doubt that the defendant possessed the minimum amounts required by § 841(b)(1)(A) and § 841(b)(1)(B), then the defendant may be sentenced *only* under 21 U.S.C. § 841(b)(1)(C) when he is found guilty of violating 21 U.S.C. § 841(a)(1), for which he is eligible for a maximum term of imprisonment of twenty years. *See United States v. Ramirez,* 242 F.3d 348, 352 (6th Cir. 2001). Where the Government has filed a Notice of Enhancement (because of the defendant's prior conviction for a felony drug offense), as the Government did in this case, a defendant properly sentenced under § 841(b)(1)(C) is subject to a maximum penalty of thirty years. The statutory maximum for Stokes Cook's first count of conviction -- conspiracy to possess with the intent to distribute cocaine hydrochloride, in violation of 21 U.S.C. § 841(a)(1) and § 846 -- is therefore thirty years. Because his sentence of 324 months did not exceed the statutory maximum penalty, Cook cannot demonstrate an *Apprendi* violation.

He nevertheless argues that the Notice of Enhancement introduced by the Government and relied upon by the district court was defective because it was predicated on false information that on October 2, 1989, he was convicted of possession of cocaine with the intent to sell. Thus, he maintains, the statutory maximum penalty for his conspiracy conviction is twenty years. He submits in support of his argument two letters from a detention center "timekeeper,"

confirming that he was detained from August 7, 1989, until February 5, 1990, and that "[he] did not leave for an overnight stay for court on above dates." The import of these letters, Cook suggests, is that he could not have been convicted in state court while he was being held at a detention center awaiting prosecution on federal charges.

While we need not resolve this issue -- also contained within the Notice of Enhancement was information that Cook in 1980 was convicted of a felony drug offense, a conviction he does not challenge -- we note that even if the Government's Notice of Enhancement were factually inaccurate (and Cook were subject to a twenty-year statutory maximum penalty), there would still be no *Apprendi* violation, because his 324-month sentence does not exceed the combined statutory maximum penalties for his two counts of conviction, when those penalties are run consecutively. *See United States v. Page,* 232 F.3d 536, 545 (6th Cir. 2000).

III. CONCLUSION

For the foregoing reasons, we **VACATE** Dawn Cook's sentence and **REMAND** for resentencing, and **AFFIRM** the district court on all issues raised by Stokes Cook and Terry Bridgeman.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENVILLE

[Filed September 7, 1999]

No. 2:98 CR00023-001

Thomas Gray Hull
U.S. District Judge

United States of America, *Plaintiff*	)
v.	)
Stokes Cook, *Defendant*	)

JUDGMENT IN A CRIMINAL CASE

THE DEFENDANT:

Was found guilty on counts One, Six, Eight, and Twelve after a plea of not guilty.

Title & Section	Nature of Offense	Date	Count
21 U.S.C. § 846	Conspiracy to	7/31/98	1

	possess with the intent to distribute cocaine hydrochloride		
21 U.S.C. § 841 (a)(1) & (b)(1)(C)	Aiding and Abetting the distribution of cocaine hydrochloride	7/31/98	6
21 U.S.C. § 841 (a)(1) & (b)(1)(C)	Aiding and Abetting the distribution of cocaine hydrochloride	7/31/99	8

See Additional Counts of Conviction Page 2

The Defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The Defendant has been found not guilty on counts 5, 7, 10, 11, &13.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Social Security Number: 161-40-7013

Defendant's Date of Birth: 10/30/1948

Defendant's USM No.: 09818-074

Defendant's Residence Address: 750 Hampton Creek Rd.
Roan Montain, TN 37687

08/30/99 /s/
Date of Imposition of Judgment Thomas Gray Hull
U.S. District Judge

09/07/1999

ADDITIONAL COUNTS OF CONVICTION

21 U.S.C. 841 (a)(1) & (b)(1)(C)	Aiding and Abetting the distribution of cocaine hydrochloride	07/31/1998	12

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 324 months.

324 months on counts 1, 6, 8, and 12 to be served concurrently.

The Defendant is remanded to the custody of the United States Marshal.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 10 years. Of 10 years as to each count to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall not possess a firearm as defined in 18 U.S.C. § 921.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive alcohol use;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

14. The defendant shall participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the probation officer until such time as the defendant is released from the program by the probation officer.

CRIMINAL MONETARY PENALTIES

The Defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

Assessment: $400.00

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecutor; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

in full immediately.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed. This special assessment is ordered pursuant to 18 U.S.C. Section - 3013.

STATEMENT OF REASONS

The Court adopts the factual findings and guideline application in the presentence report except:

as modified in the Court's Order date August 23, 1999.

Guideline Range Determined by the Court:

Total Offense Level: 36

Criminal History Category: VI

Imprisonment Range: 324 to 405 months

Supervised Release Range: mandatory 10 years as to count 1, at least 6 years as to the other counts.

Fine Range: $25,000.00 - $14,000,000.00

Fine waived or below the guideline range because of inability to pay.

The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons: None Listed.

APPENDIX C

CONSTITUTION AND STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT 5

Criminal actions--Provisions concerning--Due process of law and just compensation clauses.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 6

Rights of the accused.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and

cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT 14

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

TITLE 21. FOOD AND DRUGS

CHAPTER 13. DRUG ABUSE PREVENTION AND CONTROL

OFFENSES AND PENALTIES

21 USCS § 841 (2001)

§ 841. Prohibited acts A

(a) Unlawful acts.

Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties.

Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1) (A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the

substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 8,000,000 if the defendant is an individual or $ 20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving–

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of–

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such

person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [*21 USCS § 812* note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 1,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or

both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an

individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of

supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 100,000 if the defendant is an individual or $ 250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 200,000 if the defendant is an individual or $ 500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 404 [21 USCS § 844] and section 3607 of title 18, United States Code.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed–

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18, United States Code;

(C) $ 500,000 if the defendant is an individual; or

(D) $ 1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use–

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution.

(A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a

controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

(B) Definition. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Possession of listed chemicals with intent to manufacture controlled substance; knowledge; and other offenses. Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this title;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 310 [21 USCS § 830], or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18, United States Code,

or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined.

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $ 10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $ 20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Additional penalty. In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation

of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals.

(1) Whoever knowingly distributes a listed chemical in violation of this title (other than in violation of a recordkeeping or reporting requirement of section 310 [21 USCS § 830]) shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 310 [21 USCS § 830] have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18, United States Code, or imprisoned not more than one year, or both.

(g) [Redesignated] (f)

21 USCS § 846 (2001)

§ 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 USCS Appx §§ 1B1.3 (2001) §§ 1B1.3.

Relevant Conduct
(Factors that Determine the Guideline Range)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1) (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;

(2) solely with respect to offenses of a character for which §§ 3D1.2(d) would require grouping of multiple

counts, all acts and omissions described in subdivisions (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

(b) Chapters Four (Criminal History and Criminal Livelihood) and Five (Determining the Sentence). Factors in Chapters Four and Five that establish the guideline range shall be determined on the basis of the conduct and information specified in the respective guidelines.

18 USCS Appx §§ 2.D1.1 (2001)

***

(c) Drug Quantity Table

Controlled substances and quantity

***

(2) **Level 36**

At least 10 KG but less than 30 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);

At least 50 KG but less than 150 KG of Cocaine (or the

equivalent amount of other Schedule I or II Stimulants);

At least 500 G but less than 1.5 KG of Cocaine Base;

At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);

At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice";

At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);

At least 100 G but less than 300 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

At least 4 KG but less than 12 KG of Fentanyl;

At least 1 KG but less than 3 KG of a Fentanyl Analogue;

At least 10,000 KG but less than 30,000 KG of Marihuana;

At least 2,000 KG but less than 6,000 KG of Hashish;

At least 200 KG but less than 600 KG of Hashish Oil.

***

(6) **Level 28**

At least 400 G but less than 700 G of Heroin (or the equivalent amount of other Schedule I or II Opiates);

At least 2 KG but less than 3.5 KG of Cocaine (or the

equivalent amount of other Schedule I or II Stimulants);

At least 20 G but less than 35 G of Cocaine Base;

At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);

At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";

At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);

At least 4 G but less than 7 G of LSD (or the equivalent amount of other Schedule I or II Hallucinogens);

At least 160 G but less than 280 G of Fentanyl;

At least 40 G but less than 70 G of a Fentanyl Analogue;

At least 400 KG but less than 700 KG of Marihuana;

At least 80 KG but less than 140 KG of Hashish;

At least 8 KG but less than 14 KG of Hashish Oil.

18 USCS Appx §§ 3B1.1 (2001)

§§ 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Commentary

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the

organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of §§ 3B1.1(c).

CHAPTER FIVE - DETERMINING THE SENTENCE

Introductory Commentary

For certain categories of offenses and offenders, the guidelines permit the court to impose either imprisonment or some other sanction or combination of sanctions. In determining the type of sentence to impose, the sentencing judge should consider the nature and seriousness of the conduct, the statutory purposes of sentencing, and the pertinent offender characteristics. a sentence is witin the guidelines if it complies with each applicable section of this chapter. The court should impose a sentence sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. 18 U.S.C. § 3553(a).

SENTENCING TABLE
(in months of imprisonment)

	Offense Level	Criminal History Category (Criminal History Points) I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
Zone A	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
	9	4-10	6-12	8-14	12-18	18-24	21-27
Zone B							
	10	6-12	8-14	10-16	15-21	21-27	24-30
Zone C	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150
Zone D	27	70-87	78-97	87-108	100-125	120-150	130-162
	28	78-97	87-108	97-121	110-137	130-162	140-175
	29	87-108	97-121	108-135	121-151	140-175	151-188
	30	97-121	108-135	121-151	135-168	151-188	168-210
	31	108-135	121-151	135-168	151-188	168-210	188-235
	32	121-151	135-168	151-188	168-210	188-235	210-262
	33	135-168	151-188	168-210	188-235	210-262	235-293
	34	151-188	168-210	188-235	210-262	235-293	262-327
	35	168-210	188-235	210-262	235-293	262-327	292-365
	36	188-235	210-262	235-293	262-327	292-365	324-405
	37	210-262	235-293	262-327	292-365	324-405	360-life
	38	235-293	262-327	292-365	324-405	360-life	360-life
	39	262-327	292-365	324-405	360-life	360-life	360-life
	40	292-365	324-405	360-life	360-life	360-life	360-life
	41	324-405	360-life	360-life	360-life	360-life	360-life
	42	360-life	360-life	360-life	360-life	360-life	360-life
	43	life	life	life	life	life	life

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